

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
APPENDIX**

77-2054

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P/L

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CRUZ PADRO MARTINEZ,

Plaintiff-Appellant,

-against-

BENJAMIN MALCOLM, individually and as Commissioner
of Correction of the City of New York, PETER M.
SCHAEFER, individually and as Warden of the
Manhattan House of Detention for Men, JAMES GORMAN,
individually and as Captain of the New York County
Detention Pen,

Defendants-Appellees,

Dr. "JOHN SANTOS", Dr. "R. DANIELS", Capt. "JOHN
KING", individually and in his capacity as
Correction Officer of the City of New York, A.
TURNER, DAVID WHITE, JOHN DOE No. 1, Shield No. 1363,
JOHN DOE No. 2, Shield No. 1813, JOHN DOE No. 3,
Shield No. 830, JOHN DOE No. 4, Shield No. 2151,
JOHN DOE No. 5, Shield No. 250, JOHN DOE No. 6,
Shield No. 170, JOHN DOE No. 7, Shield No. 1694,
JOHN DOE No. 8, Shield No. 1679, JOHN DOE No. 9,
Shield No. 276, JOHN DOE No. 10, Shield No. 1701,
JOHN DOE No. 11, Shield No. 2067, individually and
as Correction Officers of the City of New York,

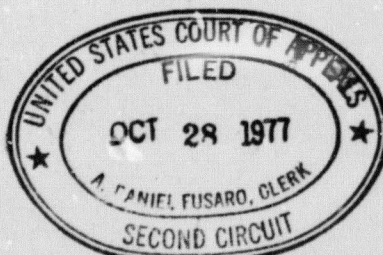
Defendants.

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COUNSEL

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LAW DEPARTMENT
CITY OF NEW YORK

SUPPLEMENTAL APPENDIX



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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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:
CRUZ PADRO MARTINEZ,
:
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Plaintiff,
:
:
v.
:
:
73 Civ. 5031
:
BENJAMIN MALCOLM, Commissioner of the
:
Corrections Department of the City of
:
New York, PETER M. SCHAEFFER, Warden
:
of the Manhattan House of Detention
:
for Men, and JAMES GORMAN, Captain of
:
the New York City Criminal Court
:
Detention Facility,
:
:
Defendants.
:
:
-----X

New York, New York
March 3, 1977

B E F O R E:

HONORABLE DUDLEY B. BONSAI,

District Judge

APPEARANCES:

STEPHEN M. LATIMER, ESQ.
Attorney for plaintiff

CHRISTOPHER M. HOULIHAN, ESQ.
Attorney for defendants

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2 (In the robing room.)

3 THE COURT: Gentlemen, I suggest, if it's agree-
4 able with you, that we put things on the record if we need
5 them without having everything on the record we talk about.

6 The first thing, and we will go on the record,
7 is that I never grant requests to charge because they always
8 come in the form best calculated for the particular client,
9 and I try to charge impartially, completely impartially, so I
10 either deny them in toto or deny them except as charged.

11 MR. LATIMER: Your Honor, before we go to requests
12 to charge, I have a request for judicial notice of something
13 that I'd like to put on the record. I would ask the Court to
14 take judicial notice of the fact that there was a case in this
15 court, Rehm against Malcolm, docket number 70 Civ. 3962.

16 The subject matter of that case was the Manhattan
17 House of Detention, that defendants Schaeffer and Malcolm
18 were defendants in that case and testified in that case;
19 that a decision was rendered by the Court on January 7, 1974,
20 which was reported at 371--

21 THE COURT: Judge Lasker's case?

22 MR. LATIMER: Yes, 371 F. Supp. 594; and that at
23 page 615, 371 F. Supp. 615, the court found as a fact that
24 there were at least eight separate instances of misconduct
25 of--mistreatment of prisoners during the course of the
litigation.

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2 THE COURT: Well, I don't know about that, and I
3 don't offhand--there might have been--of course I suppose
4 there are, but I think the jury's problem here is to find out
5 whether there was mistreatment in this case, and I don't
6 think I can read Judge Lasker's opinion or take judicial
7 notice of it if it's reported.

8 I will make a note to read that, but I think this
9 jury has got to decide on the facts of this case whether
10 there was mistreatment or not, and that is what I am going
11 to do. I don't think that an opinion of the court on conduct
12 in a prison, general conduct in a prison, can be used for the
13 purpose of establishing a violation of 1983 in a particular
14 case which the jury is hearing.

15 MR. LATIMER: If the state is claiming that the
16 warden had no knowledge of incidents of mistreatment or the
17 conditions existing in his prison, and I believe those par-
18 ticular findings--I don't care about everything in there--

19 THE COURT: I haven't heard any testimony to that
20 effect as yet. I haven't heard any to that effect, but if
21 it comes up, we can talk about it again.

22 Getting to plaintiff's requests to charge, here,
23 request number 1 is denied, except as charged. I am going to
24 charge 1983. That is what I think is the charge, and that is
25 the violation of his civil rights under color of law. Those

1 mbjl 4

2 are the elements. So 1 is denied except as charged, and 2,
3 1. 3, that I will cover, and that is denied except as charge

4 The elements, I will charge preponderance of
5 evidence. I will charge that.

6 I am not going to charge this conspiracy at all.
7 I am not going to charge conspiracy. You have got conspiraci
8 mentioned here.

9 I will charge, though, that they consider the
10 defendants, they consider them separately, and that the first
11 element is that plaintiff was beaten by the correction office
12 and that the Manhattan Detention pens were under the control
13 and supervision of the defendants. That will be the first
14 element.

15 MR. HOULIHAN: Excuse me, your Honor, perhaps I
16 misheard what you said about this. Are you saying as a
17 statement that he was, or were you saying as a question that h
18 was beaten?

19 THE COURT: The first element would be--this
20 isn't final--this is just that on July 26, 1973 plaintiff
21 was beaten by correction officers at the Manhattan Detention
22 pens, which were under the control and supervision of the
23 defendants.

24 MR. HOULIHAN: Will you charge it that way, your
25 Honor, that he definitely was beaten by them?

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2 THE COURT: They have to find that. That is the
3 first element they have to find, this is one of the first
4 elements; by a preponderance of the evidence, sure.

5 The second element, that the plaintiff was de-
6 prived of a right, privilege, or immunity secured by the
7 Constitution and laws of the United States.

8 Third, the defendant was acting under color of law

9 Fourth, that the defendant you are considering
10 subjected the plaintiff or caused the plaintiff to be sub-
11 jected to a deprivation of rights and personal and physical
12 integrity.

13 I have used that in these cases. Is that agree-
14 able to you?

15 MR. LATIMER: Yes.

16 Your Honor, there is an element of the December--
17 also the December 11th assault.

18 THE COURT: That is the one out in Riker's Island?

19 MR. LATIMER: That is the one in Bellevue
20 Hospital.

21 THE COURT: -- Bellevue, that's right, in the ele-
22 vator.

23 MR. LATIMER: Yes. Our allegation there is that-

24 THE COURT: They have to consider these incidents
25 separately, I guess, really, the first one being in the pens

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2 and the second one being in Bellevue.

3 MR. LATIMER: Because our allegation is that that
4 assault happened, I think he testified, two to three weeks
5 after the complaint in this case was filed, and that one of the
6 reasons for the assault was the filing.

7 THE COURT: Is it in the complaint?

8 MR. LATIMER: Yes, it's in the amended complaint.

9 THE COURT: That is what I am trying to get at.
10 The plaintiff amended to include it?

11 MR. LATIMER: Yes.

12 THE COURT: I think that's right. That is
13 another instance in which these elements will be considered.

14 Then there are two other points. One is the
15 alleged lack of medical treatment, and the second one is
16 the alleged taking of his property in his cell. I guess
17 those are the two others. They all will be related purely to
18 the statute.

19 I say I don't think we have any jurisdiction on
20 the property. It's only a question as to whether those two
21 incidents, whether they find the plaintiff has proven by a
22 preponderance of the evidence that he was denied his rights,
23 Constitutional rights under the statute, either alone or all
24 together, I suppose.

25 MR. HOULIHAN: I would think so, yes, by the

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2 defendants.

3 MR. LATIMER: On the medical claim, I suppose
4 you would have to charge under Estelle vs. Gamble deliberate
5 indifference to his physical condition.

6 THE COURT: That what?

7 MR. LATIMER: Deliberate indifference to his
8 medical treatment, and I think that is the standard under
9 Estelle.

10 THE COURT: Recalling the evidence so far, as I
11 understand it, he was sent to Dr. Sugrue, who was not a
12 doctor. Of course that's what would happen in this court,
13 as I mentioned to you yesterday; we don't have a doctor
14 either.

15 He was sent to Dr. Sugrue, and then the correction
16 officers testified they all went to Sugrue, too.

17 MR. LATIMER: Then he testified that five days
18 later he was x-rayed; three days after that he was--five
19 days later he was first x-rayed, and three days after that he
20 was finally sent down to the hospital where surgery was
21 performed on his--

22 MR. HOULIHAN: He was also examined on the day of
23 the injury by a doctor on Riker's Island, not Dr. Sugrue.

24 THE COURT: After he went out to Riker's
25 Island, yes.

MR. LATIMER: And was unable to get x-rayed at that time.

THE COURT: He asked to be x-rayed.

MR. HOULIHAN: He was ordered by the doctor to be x-rayed, and the order was put in by a city doctor.

THE COURT: I haven't gotten into all that, I guess, yes, but we'll have to tailor this to the evidence.

Request number 3, elements of plaintiff's claim is denied except as charged. We talked about that.

Then respondeat superior.

MR. LATIMER: I would prefer to call that defendant's responsibility rather than respondeat superior.

THE COURT: But it's tossed around here, and the law is rather confused on the subject, I find. What do you have to say about respondeat superior?

MR. HOULIHAN: Your Honor, the research that we have done, we have found that the requirement has been that for respondeat superior there has to be some element of personal involvement by the--

THE COURT: Some nexus. You said there should be some nexus.

MR. HOULIHAN: And the plaintiff said in one of his responding memoranda that was filed in an earlier part of this litigation, that these individuals would not be liable under

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2 respondeat superior unless there is such a finding that there
3 is a nexus.

4 THE COURT: I want to think about that. I am not
5 entirely clear on the law.

6 As a matter of fact, I must confess it seems to
7 me the law seems to change on the subject quite a bit. I
8 think there was testimony that one of these defendants was
9 present at one time, was that Gorman?

10 MR. HOULIHAN: James Gorman was present.

11 THE COURT: Gorman was there, yes. And I take it
12 that both Malcolm and Schaeffer had offices over there in the

13 MR. LATIMER: At 100 Centre Street, yes.

14 THE COURT: In the building.

15 MR. LATIMER: Well, Schaeffer's offices were in
16 the Tombs and Malcolm's office is at 100 Centre Street. If
17 I remember the physical set-up of the Tombs, the warden's
18 office was on the first floor, a series of offices.

19 But under Wright, my request to charge on that
20 is based also on Wright vs. McMahon, and this is the reason
21 why I asked for the judicial notice in Rehm against Malcolm,
22 where the warden who has responsibility for everything that
23 happened in the case, and Schaeffer so testified on the
24 deposition which is on tape, it has not been transcribed--

25 THE COURT: What I think I'd like to do, gentlemen.

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2 I'm very frank about this, I would like to send it to the
3 jury. If it gets too technical, I don't know what is going
4 to happen. I think if the jury should come in with a verdict
5 for the plaintiff, I think I'd have another look-see, and I'd
6 like to give the City an opportunity to develop this respondeat
7 superior a little more because I am afraid what I think I
8 ought to do, and perhaps that is--I think I ought to get it
9 to the jury, and I think about all I can say on giving it
10 to the jury is that the plaintiff contends that the
11 correction officers were under the supervision of Gorman,
12 and the corrections officers in the Tombs were under the
13 supervision of Schaeffer, and that the conduct of correction
14 officers of the New York City Department of Correction is
15 under the supervision of Commissioner Malcolm, something
16 rather general, to try to tie it in.

17 But I'd like to give you a chance, I think, if
18 they come in for the plaintiff on a post-trial motion, be-
19 cause I think this is a fuzzy area. But I am afraid if I
20 try to expound this in detail to the jury, I would be
21 prejudicing somebody, maybe you, or maybe you, I am not sure;
22 and I think I'd rather leave that.

23 That's really a matter of law, isn't it?

24 MR. HOULIHAN: Yes, sir.

25 MR. LATIMER: Yes, I think it is.

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2 THE COURT: I think it's a matter of law, and we
3 have had the evidence here, and if it should go up to an
4 appeal, it seems to me it's much better to go up on appeal,
5 both sides, if you have got a completed trial, and they can
6 measure what is done.

7 It seems to me that is much better than trying
8 to cover it all in the charge in a case like this.

9 MR. LATIMER: Your Honor, on that point, deposi-
10 tions were taken in this case, including a deposition of
11 Schaefer, in November of 1974. For budgetary and personal
12 reasons I have not had--they were taken on consent by
13 tape recorder. I have not been able to transcribe them
14 because of budgetary and personal limitations in my office.

15 For at least the past ten days the Corporation
16 Counsel immediately on request has--I think you still have--

17 MR. HOULIHAN: I have the tapes.

18 MR. LATIMER: There is a part of the deposition
19 of Schaefer, approximately from--the notes that I have in-
20 dicate maybe ten minutes--in which Schaefer--and it's the
21 first ten minutes of the deposition, so there is no fussing
22 or looking for it--which describe Schaefer's responsibility
23 for--the quote that I have on my notes, he says he is
24 responsible for everything in the institution, he is responsi-
25 ble for the training, and he describes the kinds of training,

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2 including matters relating to the use of force, that the
3 officers in his command had received.

4 And in order to complete the record then on this
5 point, I would ask that--and again it's about ten minutes of
6 that tape, be played to the jury.

7 THE COURT: What do you say about that?

8 MR. HOULIHAN: Well, your Honor, I mean, the
9 plaintiff has none of this and on his case if he had wished
10 to introduce such evidence in whatever manner he felt it was
11 necessary.

12 May I add, your Honor, that when a deponent such
13 as Warden Schaefer makes a statement as to a word such as
14 "reponsibility," I think there is quite a difference as to
15 liability and responsibility as used, you know, as used in
16 daily language.

17 THE COURT: I think my view on that again would be
18 that I think this really raises a matter of law, and I think
19 the jury will be sufficiently informed if I charge them as
20 I indicated here about the chain of command, and I think
21 that is what I am going to do.

22 I think this matter is perfectly clear, and we
23 will see what the jury does with it.

24 MR. LATIMER: I would take exception to your--

25 THE COURT: You have an exception. Fine. I'am

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2 not going to get into conspiracies. Obviously, this isn't
3 a conspiracy case. That is request number 5, which is
4 denied.

5 I will cover correction officers and interested
6 witnesses, and I will also cover the plaintiff as an interest
7 witness.

8 So request number 6 is denied except as charged.

9 Request number 7, I wouldn't charge it in that
10 form anyway, and is there really any question of failure to
11 call witnesses here? It seems to me--

12 MR. LATIMER: There is a question of failure to
13 call one of the defendants, but I know you can't infer any-
14 thing in a criminal case, but the standard in a civil case
15 is somewhat different.

16 THE COURT: You mean failure to call the
17 Commissioner?

18 MR. LATIMER: And Schaefer.

19 THE COURT: Well--

20 MR. LATIMER: There was testimony by two--
21 by the plaintiff and by another witness of the attitudes of
22 Schaefer towards the plaintiff, and I--

23 THE COURT: I haven't heard all the defendants'
24 case, so it's too soon to rule on that.

25 MR. LATIMER: If he does not call Schaefer, then--

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2 THE COURT: Right. But I think if you raise that
3 in your summation, I will charge only that they may so
4 consider it as you indicate here, but on the other hand,
5 as far as I can see, they could have been called by either
6 side, and that it's equally within their province to give it
7 no consideration at all.

8 If I charge it, I am going to charge it the double
9 way.

10 MR. HOULIHAN: Your Honor, may I just add that if
11 any testimony, highly objectionable testimony as to the
12 subjective attitudes of perhaps Malcolm or Schaefer, well,
13 I mean, there has not been any personal involvement, any
14 evidence of any personal involvement brought forth whereby
15 it would be necessary to bring them in to refute anything that
16 has been said about them, I mean solid evidence.

17 There are many hundreds, perhaps even thousands of
18 lawsuits pending against various officials of the city, and
19 to bring each one in, unless there is an actual personal
20 involvement, would be quite a burden.

21 THE COURT: The poor fellows would not be
22 available to run their prisons. They would all be coming to
23 court to testify. I understand that problem.

24 MR. HOULIHAN: As a matter of afact, your Honor,
25 the witnesses we have called over the past few days have

2 all been on duty at the time they were called and we have
3 depleted the prison staff in order to bring them in two at a
4 time rather than to bring everybody over and they have been
5 working shifts.

6 MR. LATIMER: Your Honor, most people have other
7 things to do and come to court and testify.

8 THE COURT: Let me leave it this way: if you
9 raise this in your summation, I am going to charge on failure
10 to call a witnesss and I am going to charge it both ways.

11 MR. LATIMER: If I do. Probably it will be only
12 to Schaefer.

13 THE COURT: If you do I am going to charge it
14 both ways.

15 All right, insofar as the plaintiff's
16 requests to charge, I am denying request number 5, which is
17 the conspiracy one, and I am denying except as charged the
18 remaining requests.

19 On the defendants' requests to charge, 1, I
20 will deny that except as charged, but I am not going to charge
21 it for the reasons we have stated.

22 The same thing is true of 2, monetary damages.
23 I want to let it go to the jury and see what they do with it.

24 2 is denied except as charged.

25 3, which is denied except as charged, the plaintiff

1 mbjl 16

2 does have a burden of proving unreasonable force, and I will
3 cover that.

4 MR. HOULIHAN: Will your Honor charge as to
5 the penal code? Will that be included?

6 THE COURT: Well, I am not going to charge
7 sections of the penal code, but I think we charge the sub-
8 stance, that in determining whether they exercised unreasonable
9 force, that they are entitled to use such force as is
10 reasonably necessary.

11 The whole question is whether it's reasonable
12 or unreasonable, and I will make that quite clear.

13 4, I will cover good faith. I think that is
14 an element, and I think we have covered that before. That
15 is denied except as charged.

16 5, the burden of proof, denied except as charged.

17 6, prison inmate is required to obey the rules
18 and regulations set down by the lawful prison authorities.
19 Where does that come into this case? I don't know what
20 rules and regulations--

21 MR. LATIMER: He did everything they asked him,
22 including stepping out of the cell. I would vigorously ob-
23 ject to that.

24 THE COURT: I don't remember any testimony about
25 regulations.

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2 MR. HOULIHAN: It's saying, your Honor, that he
3 was one of the elements of the--that he was punished for
4 bringing a lawsuit by being charged with an infraction of
5 the rules, where it would be our testimony that the--that he
6 did in fact violate the rules and that this was a proper
7 function of the administration of the prison system.

8 THE COURT: I will mark it denied except as
9 charged, but I doubt if I will charge anything about that
10 because I don't remember seeing it in the case, but the
11 case isn't over. I will keep an open mind on it.

12 This, I think, can be off the record.

13 (Discussion off the record.)

14 (Adjourned to Tuesday, March 8, 1977 at 9:30 a.m.)

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Martinez
v
Malcolm
3/8/77

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CHARGE OF THE COURT

THE COURT: Madame Forelady, as you are, Mrs. Epps, by virtue of occupying the first chair, and ladies and gentlemen of the jury:

First of all, I would like to join with the lawyers in thanking each of you for the carefull attention which you have given throughout this short trial, and tell you that I appreciate the sacrifices I know each of you has had to make in your own personal lives so you could serve in this very important capacity of being on a federal jury.

I told you at the outset that in a sense you and I are partners in this great cause of the administration of justice. I told you that it was my province to instruct you as to the law which applies to this case, and that on that you must accept my instructions, but on the other hand, you, the jury, are the sole judges of the facts, and it is your recollection of the facts that governs; and if your recollection should differ from that of the lawyers, or from my recollection, disregard anything that we may have said.

I also told you at the outset that during the trial you would observe me having conversations with one or the other of the lawyers. Indeed, I did. I sustained objections, and I overruled them. I told you then, and I will repeat again, please do not concern yourself in any way with

1 mbjl 2

2 regard to these conversations.

3 Above all, ladies and gentlemen, draw no
4 inference from anything I may have said during this trial
5 that I may favor one side or the other here, because, of
6 course, I do not.

7 That is not my province. It is your province.

8 You have just heard the summations of the lawyers
9 which were designed to bring before you in summary fashion
10 the evidence in this case; but again, if you find that either
11 of the lawyers went outside of the record, just disregard
12 that if you find anything they said was not in accordance
13 with the evidence.

14 You the jury are the exclusive judges of the
15 credibility of the witnesses which you have heard. You heard
16 testimony from both sides; and there were substantial con-
17 flicts in that testimony.

18 How do you determine the credibility of these
19 witnesses? I know you paid great attention to their testi-
20 mony. How did they impress you? Did you think they were
21 testifying frankly, candidly, fairly? In other words,
22 ladies and gentlemen, in judging the credibility of these
23 witnesses, please apply your own common sense and experience,
24 just as you would in determining an important matter in your
25 own private lives when you are called upon to decide whether

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2 or not you have been given a true picture of a given de-
3 cision.

4 I think you would consider a witness' demeanor, hi
5 background, his candor or lack of candor, his possible bias,
6 his means of information, and the accuracy of his recollec-
7 tion. And you will consider whether you find a witness'
8 testimony is supported or whether you find it to be contra-
9 dicted by other testimony, which you deem to be credible.

10 I think you consider whether a witness has an
11 interest in the case. Of course, here Mr. Martinez, the
12 plaintiff, has a very definite interest in the case. He
13 is seeking to recover damages from these defendants.

14 And then Captain Gorman is one of the defendants
15 in this case. He obviously has an interest in this case.
16 Then there are a number of correction officers who testified
17 during the trial. They were all in the chain of command
18 of which the defendants were on top. You may consider
19 whether they have an interest.

20 Where a witness has an interest in the case, he
21 may have the temptation to color his testimony or even to
22 withhold facts, and that is something for you to consider.
23 But this does not mean that a witness will testify falsely
24 because he has an interest in the case. It is merely
25 a factor for you, the jury, to consider.

1 mbjl 4

2 If you find that any of the witnesses who ap-
3 peared before you during this trial made any false state-
4 ments or were seeking to mislead you, you disregard that. You
5 can disregard all of the witness' testimony if you don't be-
6 lieve it, or you can accept part of it if you find it re-
7 liable, and you can disregard the rest.

8 As to the law which governs this case, ladies
9 and gentlemen, as I recall it, some of you have had prior
10 experience as jurors in other cases. If you have, dispell
11 any instructions as to the law that you were given in those
12 other cases, because the law here is probably quite different
13 from what you may have heard before. And remember to please
14 follow instructions as I give you.

15 First of all, as I told you at the outset, this
16 is a civil action, not a criminal action. This is a civil
17 action, and the burden is on the plaintiff, Mr. Martinez, to
18 prove every essential element of his case by a fair preponder-
19 ance of the evidence.

20 What does that mean? It's really a balancing
21 test. It's weighing in your minds the evidence which you
22 find supports the plaintiff's contentions against the evi-
23 dence which you find supports the defendant's contentions.

24 And, of course, it is not the quantity of the
25 evidence, it is the quality of the evidence which is important

1 mbjl 5

2 the evidence which you think described the situations as
3 they developed. So perhaps imagine a pair of scales, if you
4 will, imagine a pair of scales, and place the evidence which
5 you find supports the plaintiff's case on one side of the
6 scales, and the evidence which supports the defendant's on the
7 other side of the scales, and weigh it.

8 To prove his case by a fair preponderance of
9 the evidence, the scales must dip on plaintiff's side. They
10 must dip ever so slightly, but they must dip. If you find
11 the evidence is evenly balanced or dips on the defendant's
12 side, then, of course, the plaintiff has not carried his
13 burden of proof and your verdict would be for the defendants.

14 In considering the evidence which you have heard,
15 ladies and gentlemen, bear in mind that the law recognizes
16 two types of evidence, direct evidence and circumstantial
17 evidence. Direct evidence is the testimony of a witness
18 who testifies that he observed something, and what he actually
19 did.

20 The second type is circumstantial evidence. I
21 suppose the classic example of circumstantial evidence is if
22 you were to go home one evening and somebody was in your
23 house or in your apartment looking at television, and you
24 walk into the room and your hat and coat are wet. The
25 person can look at you and say, "Gee, it's raining outside."

1 They haven't been outside. They have looked
2 at you and they have observed your wet hat and coat, and by
3 a process of reasoning they infer that it is raining outside
4

5 There is some circumstantial evidence in this ca
6 which you may consider, and circumstantial evidence is good
7 evidence, and entitled to such consideration as you
8 find it deserves, depending on the inferences that may be
9 reasonably drawn from it.

10 No greater degree of certainty is required when
11 the evidence is circumstantial than when it is direct, but
12 in either case, ladies and gentlemen, remember, the plaintiff
13 here has the burden of proving his case by a fair preponder-
14 ance of the evidence.

15 The point was made, I think, in both the summation
16 about some witnesses or medical records, some witnesses not
17 being called or medical records being made available during
18 the trial. As far as I can tell, I think these witnesses
19 could have been called by either side if they wanted to, or
20 the hospital records could have been obtained by either side.

21 You may draw the inference, if you find that a
22 witness was not called, that the absent witness might have
23 been unfavorable to either the plaintiff or the defendant
24 here, or his testimony may have been not favorable to both,
25 but it's equally within your discretion to draw no inference

1
2 at all from the failure of either side to call a witness or
3 to produce an exhibit.

4 Now, ladies and gentlemen, this has been a short
5 trial. You have heard the evidence, and you have had the
6 benefit of the lawyers on both sides summarizing it for
7 you just a few minutes ago, and I am not going to review it all
8 again with you. I may review briefly what I understand to
9 be some of the contentions here, and that is merely to
10 help you in refreshing your recollection and for no other
11 purpose.

12 Here the plaintiff, Mr. Martinez, is suing the
13 defendants, Benjamin Malcolm, The Commissioner of Correction
14 of the City of New York, Peter M. Schaefer, Warden of the
15 Manhattan House of Detention for Men, which has been referred
16 to as the Tombs, as I recall it, during the trial, and James
17 Gorman, who testified during the trial, who was former Captain
18 of the New York County Detention Facility; I think that's
19 been referred to as the Manhattan Detention Pens during the
20 trial.

21 Mr. Martinez is suing for damages which he claims
22 he suffered for personal injuries and other things, lack
23 of medical treatment, I believe; being placed in a detention
24 pen, which he claims violated his federally protected consti-
25 tutional rights.

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2 The federal statute which is involved is Section
3 1983 of Title 42 of the United States Code which provides in
4 relevant part:

5 "Every person who, under color of any statute,
6 ordinance, regulation, custom, or usage of any state or
7 territory"--of course, New York is a state--"subjects or
8 causes to be subjected any citizen of the United States to
9 the deprivation of any rights, privileges, or immunities
10 secured by the Constitution and laws, shall be liable to the
11 party injured in an action at law."

12 That is the statute, and this case is brought
13 under that statute.

14 Here Mr. Martinez, the plaintiff, contends
15 that these defendants did violate his constitutional, federal
16 protected constitutional rights, and here you may consider
17 really his federal constitutional right to personal and
18 physical integrity.

19 Mr. Martinez claims that his rights were violated,
20 and remember he cites three separate occasions, first on July
21 26, 1974, when he contends that he was beaten up, I think
22 might be the expression, by correction officers at the
23 Manhattan Detention Pens; on December 11, 1973, when he
24 contends he was again beaten by correction officers at
25 Bellevue Hospital, I think that relates to the elevator

1 incident; and then on January 19, 1974, when he contends--
2 this, I think, referred to the incident where the correction
3 officer says there was some fighting going on, and Mr.
4 Martinez says that he was placed in a segregation facility,
5 there was not any fighting, he was put in a segregation
6 facility at the Tombs because of statements he allegedly
7 made at the memorial service for the late Dr. Martin Luther
8 King on January 15th.
9

10 On all these occasions the plaintiff's contention
11 here, and that is his theory of the case, that the correction
12 officers here were under the control and the supervision of
13 the three defendants named, that is, Mr. Malcolm, the
14 Commissioner of Correction, Mr. Schaefer, the Warden of the
15 Tombs, and Mr. Gorman, the Captain of the Manhattan Detention
16 Pen.

17 Of course, on this theory the plaintiff is not
18 contending here that these particular defendants actually
19 beat him or did these things to him, but he does say they
20 were people under their command.

21 You will recall that Mr. Martinez testified that
22 he was a member of the Inmate liaison Committee at the Tombs,
23 and he contends that because of that, that made him unpopular
24 with the correctional facilities, and that he was outspoken,
25 and that that was the reason that these people violated his

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2 constitutional rights.

3 Of course, the defendants deny these contentions,
4 and they deny that they violated the plaintiff's federally
5 protected constitutional rights at any time. As I recall
6 the testimony, they do not deny that there were incidents
7 on July 26th in Manhattan Detention Pens, and on December 11th
8 at Bellevue Hospital; but they contend that the evidence shows
9 the plaintiff started it all, that he was just being unruly and
10 difficult to manage.

11 The defendants contend that on all these occasions
12 the corrections officers were acting reasonably under the
13 circumstances to protect the public and protect the interests
14 of the other inmates as well as the interests of the correction
15 guards themselves.

16 The defendants contend that in each incident the
17 correction officers took action in good faith and without any
18 malice at all; and that the action they took was necessary
19 for the security of the premises involved and of the other
20 people who might be involved.

21 In order to return a verdict for the plaintiff
22 here, ladies and gentlemen, you must find that he has
23 proved by a fair preponderance of the evidence each of the
24 following elements:

25 First, that on July 26, 1973 the plaintiff was

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2 beaten up by the correction officers at the Manhattan
3 Detention Pen, and that at that time they were under the
4 control and supervision of the three defendants I mentioned
5 to you; that on December 11th that the plaintiff was
6 beaten by the correction officers at Bellevue who again were
7 under the control of these defendants; and on January 15th
8 the plaintiff was placed in a segregation facility without
9 reason by correction officers again under the supervision
10 of the defendants.

11 You consider each of these occasions, of course,
12 separately. You may find that on one occasion his rights were
13 violated and on another that they were not.

14 Second, that the defendant you were considering
15 is a person. You remember the statute speaks about a
16 person. Well, obviously these defendants are persons.

17 Third, that the defendants were acting under color
18 of state law. You remember I read that to you, color of law?
19 I read that to you in the statute. We will hear, ladies and
20 gentlemen, the defendants and these corrections officers were
21 all connected with the City Department of Correction, and
22 I don't think there is any dispute that anything that they
23 did during this period of time was done in accordance with
24 what they deemed to be their duties as correction officers,
25 and therefore that they were acting in all of these occasions

2 under color of New York law.

3 Fourth, that the plaintiff is a citizen of the
4 United States, and under the statute, that covers only
5 citizens of the United States.

6 I think there is no issue here that Mr. Martinez
7 is a citizen of the United States.

8 Fifth, and this is the really important element,
9 that Mr. Martinez was deprived of a right, privilege, or
10 immunity secured by the Constitution and the laws of the
11 United States.

12 Well, how do you go about determining that? If
13 you find that on one or more or all of these occasions the
14 correction officers acted unreasonably in beating him up,
15 did more than was called for by the occasion, then you may
16 find that Mr. Martinez was denied his right of personal and
17 physical integrity.

18 You remember I mentioned that to you a little
19 while ago, was denied his right of personal and physical
20 integrity.

21 And the final element is that the defendants, now
22 they are these top defendants, subjected or caused Mr.
23 Martinez to be subjected to a deprivation of his right to
24 personal and physical integrity. Here again the plaintiff
25 is contending that they were the commanders, and that these

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2 other correction officers were carrying out their instructions.

3 The plaintiff need not show by the evidence that
4 the defendants knowingly deprived him of his rights. The
5 plaintiff must show that the defendants failed to act in a
6 reasonable manner with respect to these transactions, in
7 other words, that they used more force than was necessary,
8 they did things that were not necessary, and that this action
9 on their part was a substantial factor in depriving Mr.
10 Martinez of his right to personal and physical integrity, and
11 causing his injuries as described in the evidence.

12 So what it comes down to here, the important
13 factor is, do you find that the action of the correction
14 officers was reasonable on these occasions? Here I guess we
15 would all recognize that one set of circumstances might
16 demand minimum restraint of a person in custody and be
17 reasonable, whereas another set of circumstances might call
18 for much greater action and restraint to be reasonable.

19 In determining what was reasonable on these
20 occasions, ladies and gentlemen, draw on your own general
21 knowledge and experience and measure the conduct of these
22 correction officers by what you think would have been
23 reasonable under the circumstances brought out in the evidence.

24 Of course, in doing that remember that the
25 warden or the other authorized officials are required to

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2 maintain order and discipline in the institution, and that
3 they have the right to use such physical force as may be
4 reasonable and necessary under the circumstances that might
5 be brought out.

6 If, after considering the evidence, you find that
7 the plaintiff has failed to prove these elements by a fair
8 preponderance of the evidence, then you will return a verdict
9 in favor of the defendants.

10 But, on the other hand, if you find that the
11 plaintiff has proved each of these elements by a fair pre-
12 ponderance of the evidence, then and only then do you consider
13 the question of damages which you will award him.

14 The mere fact I will now discuss damages with you
15 indicates no opinion on my part as to how you should find on
16 the issue of liability in the instructions which I have
17 given you.

18 In assessing damages, ladies and gentlemen,
19 personal feelings and sympathy must not enter into your
20 consideration. Your aim here is to award the plaintiff
21 a sum of money which you think is fair and reasonable com-
22 pensation to him for the injuries you find he has sustained by
23 reason of the violation of his rights; and here again the
24 plaintiff has the burden of proof. He has the burden of
25 proof of proving his damages by a fair preponderance of the

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2 evidence.

3 It's the same test that I gave you before. Damage
4 can be awarded only for factors which came out in the evidence
5 as to these particular events.

6 So here consider, ladies and gentlemen, the in-
7 juries which the plaintiff claims he sustained on July 26th
8 and on December 11, 1973. Consider also his claim that he
9 was not accorded prompt medical treatment. Consider his claim
10 that he was placed in segregation following the Dr. Martin
11 Luther King sermon. Consider the evidence as to the fact some
12 of his personal possessions, as I recall the testimony, he
13 said were not present in his cell when he returned to his
14 cell at the Tombs in July 1973.

15 As to his personal injuries, ladies and gentlemen,
16 that is, the injuries which were brought out in the evidence,
17 consider whether you think these injuries are permanent or
18 temporary; the extent to which you think they were attributable
19 to the actions of the correction officers beyond what they
20 should have done; and you may consider also the pain and
21 suffering that you find that the plaintiff may have sustained
22 by reason of these actions of the correction officers, if you
23 find them to have been excessive.

24 But in determining what damages he might be
25 entitled to for his pain and suffering, the only yard stick,

of course, is your common sense and judgment, and your award must be based on a full consideration of the evidence and bear reasonable relationship to what the evidence indicates the plaintiff suffered by reason of these events.

When you retire to deliberate, I am going to send all the exhibits in to you so they will be with you in the jury room. And, ladies and gentlemen, remember that a jury deliberation is one in which everyone expresses their views, exchanges their views, and don't be afraid to change your original view because of pride of opinion or for any other reason, should you find after discussing it with your fellow jurors that your original view is wrong.

Also, remember, ladies and gentlemen, that you must reach a verdict here unaffected by any sympathy, bias or by any prejudice.

Both sides here, of course, want a decision to be made by you. Each of them naturally wishes that the verdict be in their favor, but both want the case to be decided.

So do listen carefully to the positions taken by your fellow jurors and seek to facilitate the course of justice here by reaching a verdict for one side or the other.

There will be six of you on the jury, and your

decision must be unanimous. I mention that because you may have served on other juries in the state courts where the rule is different. Here all six of you must agree on your verdict.

Your verdict here will be either for the plaintiff, in which case you will state the amount of damages you award him, or your verdict will be for the defendants.

All right, come forward, gentlemen, please.

(At the side bar.)

THE COURT: Any exceptions?

MR. HOULIHAN: No, sir.

MR. LATIMER: Yes. On the charge, where you said that the plaintiff contends on January 19, 1974, it's also his contention that he was held in segregation a day longer.

THE COURT: I know, but I told them I wouldn't give them all the contentions. That's all right.

MR. LATIMER: You stated that on each of the dates that they would have to find he was under the control of three defendants. I don't think it's clear that--

THE COURT: - I tried to cover it by the chain of command.

MR. LATIMER: They can find--they don't have-- the inference is that they must find all three--against all three defendants. I think it should be made more clear that

2 they can find against each defendant.

3 THE COURT: I thought of doing that, and then I
4 thought that you were better off if I let it go to all three
5 defendants and afterwards try to break it down if they come
6 in with a verdict for plaintiff.

7 I think that was fairer to you and to both
8 sides. I think it's hard for them to keep them straight.
9 You have a lot of pieces of paper.

10 MR. LATIMER: That's all, your Honor.

11 MR. HOULIHAN: Defendant does not have any ex-
12 ceptions.

13 THE COURT: Thank you very much, gentlemen.

14 All right.

15 (In open court.)

16 (The alternate jurors were excused by the Court.)

17 (A United States Marshal was sworn.)

18 (The jury retired to commence deliberations at
19 3:05 p.m.)

20 MR. HOULIHAN: Your Honor, there is one slight
21 difficulty. Perhaps on Friday a piece of evidence was mis-
22 laid. It was Defendant's Exhibit E. Photocopy of that is
23 available, and it's my understanding that plaintiff has no
24 objection to substituting that.

25 MR. LATIMER: No. It's identical.

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2 THE COURT: Thank you very much.

3 (Recess.)

4 (In the robing room at 4:45 p.m.)

5 THE COURT: I have received a note from the jury
6 reading:

7 "Your Honor, are we voting on one count or three
8 separate counts? R. Epps, Foreman."

9 That is what we were discussing. We'll get to
10 something else after we get through discussing it. The point
11 is, if we give them this at this point it would certainly
12 keep them straight, wouldn't it?

13 MR. LATIMER: Yes, it would. Then ask them to
14 return a verdict as to each particular defendant.

15 THE COURT: That's in here, the ones involved,
16 because on the first one, Malcolm and Gorman; but the other
17 fellow involved, Schaefer, is not involved in the first one.

18 MR. LATIMER: No.

19 THE COURT: Maybe that is a good idea.

20 MR. LATIMER: Your Honor, can we have the pro-
21 posed **requests** that both Mr. Houlihan and I marked as
22 Court's Exhibits?

23 THE COURT: Sure. Right here. I think this one
24 here; is that right?

25 MR. HOULIHAN: Yes, sir. I don't think you have

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2 mine, your Honor. I have it outside.

3 THE COURT: I don't think I saw yours. I
4 remember seeing this one.

5 MR. HOULIHAN: Mine were less specific.

6 THE COURT: Do you want them marked? I didn't
7 consider them. Did you show me these yesterday?

8 MR. HOULIHAN: No, sir.

9 THE COURT: All right. I will see that is marked
10 as a court exhibit.

11 MR. HOULIHAN: Maybe I spoke too soon. Perhaps
12 I should submit them and ask that they be marked also.

13 THE COURT: All right. We'll see they are both
14 marked.

15 MR. HOULIHAN: I see your Honor's point about
16 giving them the questions at this time, but I feel that it
17 might add a new dimension which might be misinterpreted by the
18 jury.

19 THE COURT: I think on that number three on page
20 two we can talk about "unreasonably" before, and then we
21 change suddenly to "unjustifiable."

22 Shouldn't it be unreasonably on all of them?
23 Why is one unreasonanble and the other is unjustifiable?
24 Segregation would be unreasonable.

25 MR. LATIMER: It would be unjustifiable, not

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2 unreasonable. You either have a justification for
3 putting somebody in segregation or you don't.
4

5 THE COURT: I see what you mean. Yes, I guess
6 that's right.

7 W. t we call them in and give them these
8 questions and see if that will help them? I will take the
9 note and I will tell them what they have got to find and
10 give them these questions, and if that helps them out, if
11 they fill it out, and then tell us if they find for the
12 plaintiff what are the damages.

13 Let's try it.

14 MR. HOULIHAN: I'm sure your Honor will give some
15 sort of prefatory remark. Would you perhaps tell them that
16 this is not any indication of the Court's view of the matter,
17 that--

18 THE COURT: Sure.

19 MR. LATIMER: These are merely questions designed
20 to assist them.

21 THE COURT: In view of this note, we thought this
22 might be of use, something on that order. Sure, we can do that.

23 All right, gentlemen, let's go ahead and do it.

24 MR. LATIMER: Your Honor, off the record.

25 (Discussion off the record.)

(In open court, jury present.)

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2 THE COURT: Ladies and gentlemen, I received Mrs.
3 Epps' note, which reads, "Your Honor, are we voting on one
4 count or three separate counts?"

5 Now, of course there aren't any counts in this.
6 There were several incidents. There were not counts. There
7 were several incidents, and of course, the issue involved
8 which the plaintiff here must prove by a fair preponderance
9 of the evidence is whether his constitutional rights, his right
10 to integrity, were violated on these occasions.

11 That is really what it amounts to. The problem
12 arises, I think, because this happened in different places;
13 part of it was in the hospital, as I remember; part of it
14 in Bellevue and part of it in the Tombs, and the
15 relationship of these defendants is a little different.

16 Mr. Malcolm, of course, was Chief of the
17 Correction Department, in overall charge, and then as I
18 remember it, defendant Gorman was up with the Manhattan
19 Pens, am I correct in that?

20 I think so. And then Mr. Schaefer, the other
21 defendant, he was in charge of the people at Bellevue. So
22 there is a difference there. And I thought and counsel and
23 I have been thinking about this quite a little bit, whether
24 it would help you in your deliberations here if I gave you
25 sort of a little list of questions here to the forelady to

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2 be answered, and if you answer these questions, and you answer
3 them indicating that the correction officers did use un-
4 reasonable force on these occasions or what was done, then
5 you would come in with an award for damages against the
6 particular defendants who were involved.

7 This list of questions is marked "Special
8 Verdict." It is really just a list of questions.

9 1. Did the correction officers use unreasonable
10 force against Mr. Martinez on July 26, 1973 in the Manhattan
11 Detention Pens? You remember that episode.

12 If you find that he did, then the next question
13 is: were the correction officers under control of the
14 defendant Benjamin Malcolm, who was the head of the Correction
15 Department?

16 And, secondly, were the correction officers under
17 the control of defendant James Gorman?

18 This goes on and does the same thing with the
19 incident at Bellevue and the incident at the Tombs when
20 Mr. Martinez claimed he was placed in segregation.

21 Finally, the fourth question is, after he was
22 placed in segregation, whether he was continued there longer
23 than he should have been.

24 I think I might give you these questions and see
25

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if that helps you out in your note.

Do you think that would help you?

THE FORELADY: We have already reached a verdict.

THE COURT: You have? Well, wait a minute, then.

All right. You answer present as your names are called.

(The jurors names were called and all responded.)

THE CLERK: Madam Forelady, has the jury reached a verdict?

THE FORELADY: Yes.

THE CLERK: How do you find?

THE FORELADY: We, the jury, favor the defendants.

THE COURT: Members of the jury, listen to your verdict as it stands recorded. You say you find in favor of the defendants and so say all of you?

THE FORELADY: Yes.

THE COURT: Do you wish the jury polled?

MR. LATIMER: Yes, your Honor, I wish the jury polled.

THE CLERK: Members of the jury, listen to your verdict as it stands recorded. You say you find in favor of the defendants.

(Each juror, upon being asked, "Is that your verdict?", answered in the affirmative.)

THE COURT: All right, well, thank you, ladies and gentlemen. I was going through an exercise trying to help you, but thank you for telling me. I should have asked you first, probably, but I want to thank you all for the care and attention you have given this case.

This was not an easy case, ladies and gentlemen, I know, involving the kind of things we learned about during the trial, but this was a great public service that you have rendered.

I don't comment on a jury verdict. I told you I am absolutely neutral in these things, and I must be, so I don't comment on a jury verdict, but I do want to say to you that I know you gave this case careful attention and considered the evidence, as you should, and you asked questions during the course of your deliberations, and you had a chance to view the exhibits, and I think all that is a fine tribute to the jury system.

I want to thank you now.

(Court Exhibits 1, 2 and 3 were marked.)

THE COURT: I think I will mark the requests to charge a Court Exhibit.

(Court Exhibit 5 was marked.)

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